WEE HUAY FONG

v.

PENTADBIR TANAH, KLANG & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ZULKEFLI MAKINUDDIN J
[ORIGINATING MOTION NO: MT4-21-167-2001]
28 JUNE 2002

LAND LAW: *Sale of land - Order for - Application to set aside - Notice of enquiry - Whether service of summons in compliance with provisions of National Land Code - Legal advice - Whether chargor denied access to legal advice - Charge - Whether attested in compliance with s. 211 of National Land Code - Alleged breach of legislative provisions - Whether applicable to present issue - Land administrator - Whether provisions of Evidence Act 1950 to apply - Power of attorney - Whether validity a cause to the contrary*

CIVIL PROCEDURE: *Action - Commencement - Foreclosure proceedings - Existence of pending suit before another High Court on related matter - Whether second respondent has discretion to commence both actions together*

The first respondent, as the land administrator, made an order for sale of the chargor's land based upon the second respondent's application as chargee of the said land. In applying to this court to set aside the said order the chargor alleged, *inter alia*, non-compliance with the provisions of the National Land Code ('NLC') and other irregularities committed by the respondents.

Held:

[1] The first respondent did not breach any requirements under the NLC in relation to the notice of enquiry. The summons was properly served by the second respondent even though s. 261(2) of the NLC exempted such a necessity. Furthermore, the summons had been served at the chargor's last known address in compliance with s. 413(1)(c) of the NLC though no one was present at the said premise during the relevant period. (p 516 a-b)

[2] The chargor had not been prejudiced when the land administrator proceeded with the second enquiry. The argument that the chargor and her husband were bereft of legal advice was not sustainable as her husband

demonstrated a profound knowledge of the law at the said enquiry. Even if they were allowed to seek such advice, they would be ventilating the same issues raised at the second enquiry. Thus, chargor and her husband had waived their rights for legal representation. Furthermore, the chargor could have sought an adjournment to seek legal advice but did not do so. (p 516 d-f)

[3] Section 211 of the NLC seeks to prevent forgery by ensuring that an attesting witness certifies that the person executing the charge is in fact the chargor. As the chargor did not deny signing the said charge document, the purpose of requiring the attestation under s. 211 has been served. The said charge was therefore not a void instrument, and once registered become indefeasible *vide* s. 340(1) of the NLC. (p 517 c-e)

[4] The alleged breaches of various legislation go to the validity of the credit facilities agreement granted by the second respondent to the borrower and this challenge by the chargor was strictly an action *in personam.* However, the present action against the chargor was an action *in rem* (foreclosure) wherein the land administrator had granted an order for sale *vide* s. 263 and the second respondent's claim in foreclosure proceedings was founded on the charge executed by the chargor and was duly registered in its favour. It was not based on the credit facilities agreement. (p 518 e-i)

[5] Pursuant to s. 3 of the Evidence Act 1950, the land administrator was not a 'court' for the provisions of the said Act to apply. This negates the chargor's contention that the charge instrument ought to be disallowed under s. 68 of the same to be used as evidence of the charge for the order for sale. Furthermore, s. 260 of the NLC does not require the second respondent to produce a copy of the charge when applying for an order for sale. (p 519 g-h)

[6] The power of attorney was executed by the borrower company, not the chargor, in favour of the second respondent. Furthermore, considering that the validity of the charge in question was not based upon the power of attorney, the chargor's contention that the non-attestation of the power of attorney nullifies the charge was a non-issue. The validity of the power of attorney was clearly not a cause to the contrary. (p 520 b-c)

[7] The second respondent could commence foreclosure proceedings against the chargor whilst there was a pending civil suit before another division of the High Court on a related matter. The foreclosure action was based on the registered charge, whereas the said civil suit premised was upon the credit facilities agreement with the borrower company and not the chargor. In fact the second respondent, as security holder, has the absolute discretion to either commence both actions together or either one, without prejudicing its rights to commence the other action. (p 520 f-g)

[Application dismissed with cost.]

Case(s) referred to:
Citibank v. Mohamad Khalid Farzalur Rahaman & Ors [2000] 3 CLJ 739 ***(refd)***
Isaac Alexander Brott v. The Queen [1992] 2 CLJ 951; [1992] 4 CLJ (Rep) 78 ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(foll)***
Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 CLJ 609 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 24
Evidence Act 1950, s. 2, 68
National Land Code, ss. 5, 27, 28(4), 29(2), 206(1)(a), 207(3), 211(1)(2)(3), 256(3), 260, 261(1)(c), (2), 263(1), 340(1), (2), 431(1)(c)
Power of Attorney Ordinance 1949, s. 3(1)(a)
Securities Industries Act 1983, ss. 2, 12

For the applicant - Amrit Kaur; M/s Lee Swee Seng
For the 1st respondent - Mohd Asnawi Abu Hanipah, Assistant State Legal Adviser Selangor
For the 2nd respondent - JL Foo; M/s Lee Hishammuddin

Reported by M Maheswaran

JUDGMENT

Zulkefli Makinuddin J:
This is an application by the applicant chargor ("applicant") to set aside the order for sale of the applicant's land made by the first respondent as the land administrator and to seek a declaration that the charge is null and void. The relevant facts of the case are as follows:

Tymeju Management Services Sdn. Bhd ("the borrower company") and the second respondent entered into a share margin trading and financing agreement ("the agreement"). Under the agreement the second respondent is empowered to acquire and dispose of securities on behalf of the borrower company. All shares traded and comprised in the mortgage securities are duly registered in the name of the second respondent and are retained in its custody as security for the loan as required by the second respondent. Additionally, a third party-party charge on the applicant's land was executed between the applicant and the second respondent for the credit facilities granted by the second respondent to the borrower company. Upon application by the second respondent as chargee of the said land the first respondent as the Land Administrator granted an order for sale of the said land under s. 263 of the National Land Code

("NLC").

The applicant has raised a number of grounds or issues in support of his application. In my view the relevant issues that need to be dealt with by this court are as follows:

Firstly, the applicant has alleged that the order for sale was obtained irregularly by the second respondent. The applicant contended that the first respondent, the land administrator's notice of enquiry did not conform to the provision of s. 27 of the NLC which states as follows:

> Before holding any enquiry, the Land Administrator shall:
>
> (a) Publish in such manner as he may consider appropriate in the circumstances of the case a notice in Form 2A; and
>
> (b) Serve on every person or body who is to his knowledge interested in the subject matter thereof a copy of that notice to which shall be appended the additional notice set out in the supplement to that Form.

To deal with this issue raised by the applicant it is necessary to refer to the background facts of the case gathered from the affidavits and documentary exhibits filed by the parties in this case as follows: Upon an application by the second respondent for an order for sale under s. 260 NLC, the land administrator appointed a time and venue for an enquiry, pursuant to s. 261(1) NLC. In compliance with s. 261(1)(c) NLC, the land administrator issued a summons, requiring the chargor to appear at the enquiry and show cause why an order for sale should not be made. The summons was dated 30 May 2001, and required the chargor to attend an enquiry on 2 July 2001 (hereinafter referred to as "the first enquiry"). The summons was served by an officer of the land administrator by leaving the same at the premises of the chargor on 7 June 2001. There was also an advertisement in The Malay Mail on 27 June 2001, effected by the second respondent upon the Land Administrator's instructions informing of the date of the first enquiry. Ample notice was therefore given. Nevertheless, the chargor and/or her solicitors failed to attend the first enquiry. The land administrator adjourned the enquiry to 26 July 2001 (hereinafter referred to as "the second enquiry"). The land administrator did not give notice of the new date fixed by the land administrator to the chargor. However, the solicitors for the second respondent issued a letter dated 23 July 2001 to the chargor, enclosing the summons (with the first enquiry date), informing in the said cover letter of the second enquiry date, ie, 26 July 2001. This was acknowledged received by the chargor and a contemporaneous note made by the second respondent solicitor's despatch clerk shows that the letter was received by the chargor at about 11am on 25 July 2001. The chargor and

her husband attended at the second enquiry on 26 July 2001.

It is my finding that the first respondent did not breach any requirements under the NLC in relation to this notice of enquiry. Service of the summons notifying the chargor of the first enquiry was in compliance with s. 27 NLC. In fact, s. 261(2) NLC discounts the need for the advertisement which was in any event carried out by the second respondent. Further, the service by the first respondent's officer by leaving the summons at the last known address is in compliance with s. 431(1)(c) NLC. A reference to exh. "SA1" in encl. 6A showed that the process server had sworn a statutory declaration stating that the chargor, her employees, or relations were not present at that address at the relevant time of service. The averments in the land administrator's affidavit on these facts remain unrebutted. As such, they must be accurate and deemed admitted by the chargor. (See the case of *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609). The chargor is now contending that, given the late notice of the second enquiry, the chargor and her husband attended the said second enquiry without the benefit of being advised by their solicitor. On this point I would state that the husband of the chargor had demonstrated at that second enquiry his capability of forwarding detailed arguments of law. By the chargor's own admission, her husband put forward various submissions involving sub-s. 206(1)(a), 207(3), 211(1), (2), (3) and the fifth schedule (s. 211) of the NLC. Given the husband's profound knowledge of the law, it is indeed curious to note that the chargor is now saying that they did not have the benefit of legal advise. Even assuming that the chargor should have been given the opportunity to seek legal advise now, on record I find that the chargor is returning with exactly the same issues of illegality, breach of the NLC, etc. raised at the second enquiry. Therefore, there was no prejudice caused to the chargor when the land administrator proceeded with the second enquiry. I am also of the view that the chargor and her husband had waived their rights to being legally represented at the second enquiry by taking it upon themselves to submit at that enquiry. The chargor was entitled to request an adjournment in order for her to obtain legal advise but this was not done. Section 29(2) NLC provides as follows:

> the Land Administrator shall give to any person claiming to be interested … an opportunity of being heard … either in person or by his advocate and solicitor … .

Having been given the right to be heard in person, the chargor and/or her husband no longer had the right to be heard through their advocate and solicitor. Even if the chargor had been legally represented/advised at the second enquiry, the outcome would have been identical. Further, it is not the fault of the second respondent that no notice was issued pursuant to s. 28(4) NLC.

This is clearly an obligation of the land administrator, over which the second respondent has no control. The rights of the second respondent should not be defeated by an omission of the land administrator. It would clearly be a futile exercise to set aside the order for sale, as the chargor would again rely on the same issues in the event that this matter goes before the land administrator again.

Secondly, the applicant has alleged that the charge document in Form 16A of the NLC is void on the ground of non-attestation and falsified attestation. The applicant alleges that the charge was not executed before the attesting solicitor, one Mr Wan Soo Khuan. On this issue I find that the applicant as the chargor has never alleged not signing the charge document. Her only contention was that it was not signed before the attesting solicitor. The attestation clause in Form 13B of the NLC serves to confirm and verify that the signatory to the charge was in fact the chargor. The purpose of s. 211 NLC with regard to attestation of instruments of dealing is to prevent forgery of the charge document. If the chargor herself does not deny signing the said charge document, the purpose of requiring the attestation has been served, ie, it is confirmed that the chargor is in fact the person who executed the charge. I am of the view in interpreting the provision of a statute the court should look to the purpose of the Act, ie, the mischief it is intended to address. [See *Citibank v. Mohamad Khalid Farzalur Rahaman & Ors* [2000] 3 CLJ 739]. Here, the mischief is forgery. Section 211 of the NLC seeks to prevent forgery by ensuring that an attesting witness certifies that the person executing the charge is in fact the chargor. If, as in this case, the chargor does not dispute the fact that she is the person who executed the charge, this mischief has been addressed. The purpose of s. 211 NLC has been met. Therefore, there is no breach of s. 211 NLC. The said charge is therefore not a void instrument, and once registered become indefeasible by virtue of s. 340(1) NLC. In the case of *Isaac Alexander Brott v. The Queen* [1992] 2 CLJ 951; [1992] 4 CLJ (Rep) 78, which is a case from the High Court of Australia, a witness to an execution of a guarantee falsely attested that the person who executed the said guarantee executed the same before him. This was in fact untrue as the said person had in fact died prior to the purported time of execution. The Australian High Court in that case at p. 90 had this to say:

> By placing his signature on the guarantee, the applicant attested his role as a witness. He was asserting that Wilson had executed the guarantee in his presence. That assertion was false. While the witnessing of the guarantee was not vital to its efficacy, it no doubt had some commercial significance … This was a lie about the circumstances in which the guarantee was executed rather than a lie about the guarantee itself. It is not enough that what the applicant did may have had commercial significance.

a … Nothing the applicant did made or altered the character or legal effect of the guarantee.

Although *Isaac Alexander Brott*'s case concerns a guarantee, the principles enunciated therein that an inaccurate attestation does not alter the validity of the document must apply here. On the present facts, the form of the charge b complies with the requirements of the NLC. The solicitor attested that the chargor executed the charge before him. This, the chargor says is untrue. Even if it is in fact untrue, it only goes to show that the circumstances in which the said charge was executed was untrue. However, what remained true are the contents of the charge and that the chargor did in fact execute the said c charge. Surely, this cannot render the charge void or insufficient.

Thirdly, the applicant has alleged that in granting financing under the credit facilities agreement to the borrower company for which the charge was created the second respondent breached the following legislations:

d (a) Subsection 2 and 12, Securities Industries Act 1983;

(b) Securities Industries (Dealing in Industries) Declaration 1996;

(c) Securities Industries (Exempt Dealer) Order 1996; and

e (d) Section 24, Contracts Act 1950.

Without even going into the merits of the above contention of the applicant, I am of the view that these issues are wholly irrelevant to the present charge action. The present action against the chargor is an action *in rem* (foreclosure), wherein an order for sale was granted by the land administrator pursuant to f s. 263 NLC. The second respondent's claim in foreclosure proceedings is founded on the charge executed by the chargor, and duly registered in its favour. It is not based on the said credit facilities agreement. The said charge, once registered, is indefeasible unless it falls within an exception under s. 340(2) NLC. The alleged breaches of various legislations, if at all, go to g the validity of the credit facilities agreement granted by the second respondent to the borrower. Under s. 263(1) NLC, the land administrator shall grant an order for sale unless there is a cause to the contrary. What constitutes a cause to the contrary is now settled law as laid down in the case of *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36. In that case, the Supreme Court h established three categories under which a cause of contrary may be shown. The Supreme Court in that case recognised that s. 256(3) NLC which deals with the court's powers to grant an order for sale should be given 'a very narrow and restrictive interpretation'. If the chargor fails to bring herself within one of the three categories of cases mentioned, no cause to the contrary could i be shown and the court would be obliged to make an order for sale. An action

which challenges the legality of the credit facilities agreement is strictly an action *in personam*. Proceedings under s. 263 NLC are not concerned with any contractual claims that the Chargor may have against the second respondent. Further, the land administrator in foreclosure proceedings has no powers to adjudicate on issues which may ordinarily be heard by a court. The land administrator is not a court within the definition in s. 5 NLC. Once he is satisfied that the charge is registered, then the only question for him to decide is whether there had been a default in the payments provided for, and if he was so satisfied, he is obliged to make an order for sale.

Fourthly, the applicant has alleged that there is no evidence of a valid charge. Learned counsel for the applicant contended that the land administrator had relied on the charge registered with the land office under the charge instrument (Form 16A) when he issued this particular order for sale. Learned counsel for the applicant contended that whether or not this charge instrument can be used as evidence of the charge to secure the repayment of the debt owed by the borrower is circumscribed by s. 68 of the Evidence Act 1950 which states as follows:

> If a document is required by law to be attested, it shall not be used in evidence until one attesting witness at least has been called for the purpose of proving its execution, if there is an attesting witness alive and subject to the process of the Court and capable of giving evidence.

It was submitted for the applicant therefore that the Evidence Act 1950 would disallow the charge instrument (Form 16A) to be used as evidence of the charge for this order for sale and consequently this order for sale is *ultra vires* the National Land Code and must automatically be set aside for want of evidence of a charge. On this point I wish to state that the Evidence Act 1950 does not apply to proceedings before the land administrator. Section 2 of the Evidence Act 1950 states:

> This Act shall apply to all judicial proceedings in or before any court, but not to affidavits presented to any court or officer nor to proceedings before an arbitrator.

It is clear from the definition of a 'court' in s. 3 of the Evidence Act that a land administrator is not a court for the purposes of the Evidence Act. Therefore, the provisions of the Evidence Act do not apply to the present case. Consequently, s. 68 of the Evidence Act is of no application. Further, given that the original charge document (Form 16A) is lodged with the land office, it is the land administrator who would in fact possess the original charge document. There is no requirement under the s. 260 of NLC for the second respondent to produce a copy of the charge when applying for an order for sale under s. 260 NLC. Therefore, the chargor's contention that the solicitor

attesting to the execution of the charge should be called to prove the said charge under s. 68 of the Evidence Act is untenable.

Fifthly, the applicant alleged that the power of attorney executed by the borrower company is invalid because it was not attested in accordance with the mandatory requirements of s. 3(1)(a) of the power of attorney ordinance 1949. The learned counsel for the applicant further contended that as a direct consequence of this invalid power of attorney the contract for the loan to the borrower company secured by the charge is not enforceable. On this issue I would like to state that the power of attorney was executed by the borrower company not the applicant chargor, in favour of the second respondent. The purpose of such a power of attorney is to vest the second respondent with the necessary authority to, *inter alia*, take action in respect of the shares pledged to the second respondent as security. I am of the view given that the validity of the charge in question is not based upon the power of attorney, it can hardly be contended by the applicant chargor that the non-attestation of the power of attorney nullifies the charge. The validity of the power of attorney is clearly not a cause to the contrary.

Lastly, the applicant has alleged that there is a parallel proceedings filed by the second respondent before another High Court in Shah Alam in High Court No. 3 [GS MT3-22-1027-1999] which has an effect on the said order for sale made by the first respondent. In that case counsel for the applicant stated that although judgment in default of appearance had been given by the senior assistant registrar to the second respondent against the borrower company, the said borrower company has filed an application for the default judgment to be set aside. It was submitted for the applicant that whilst the application to set aside the default judgment is pending the second respondent should not have proceeded to obtain an order for sale from the land administrator and consequently this has led to the filing of this originating motion to annul the charge on grounds of "cause to the contrary". On this issue raised by the applicant I am of the view that there is no bar to the second respondent commencing foreclosure proceedings against the applicant chargor during the pendency of the said High Court Civil Suit. The foreclosure action is based on the registered charge, whereas the said civil suit is based on the credit facilities agreement with the borrower company and not with the chargor. In fact, it is trite law that the second respondent, as security holder, may choose at its absolute discretion to either commence both actions together or either one, without prejudice to its rights to commencing the other action. [See the case of *Low Lee Lian v. Ban Hin Lee Bank Bhd (Supra)*].

For the above stated reasons I hereby dismissed the applicant's application with cost.